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No. 82-6080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,
v.
W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTIONS PRESENTED

I. Whether the standard employed by the United States Court of Appeals for the Fifth Circuit, which both assured that Petitioner's claims had been fully and fairly reviewed and accorded proper respect to the State's interest in the finality of its judgments, was appropriate.

II. Whether the introduction of psychiatric testimony on the future dangerousness of a capital defendant, implicitly approved in this Court's previous decisions, amounts to constitutional error requiring reversal.

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Supreme Court Rule 42 for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding in support of Respondent's position.

The Washington Legal Foundation is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than 85,000 members and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of its Crime Victims Program, Death Penalty Project, and Court Watch Project. These programs are designed to advance the rights of crime victims and law-abiding citizens whose interests are too often ignored by the institutions which administer the criminal justice system. Among other activities, WLF provides legal assistance, guidance, and educational materials to the victims of violent crime and their families and participates in court cases with broad public interest implications.

As part of its Death Penalty Project, WLF has appeared as *amicus curiae* in the following death penalty cases before this Court: *Enmund v. Florida*, —— U.S. ——, 102 S. Ct. 3368 (1982); *Zant v. Stephens*, —— U.S. ——, 102 S. Ct. 1856 (1982); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Foundation is also presently participating in a death penalty case before the United States Court of Appeals for the Fifth Circuit, *O'Bryan v. Estelle*, No. 82-2422 (5th Cir. 1982).

In addition, WLF attorneys have testified before the U. S. Congress on capital punishment issues, *see, e.g.*, *Hearings on H.R. 5679 Regarding A Federal Death Penalty Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of the Washington Legal Foundation), and regularly debate opponents of capital punishment in a variety of public forums.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by addressing some of the broader issues implicated in determining the standard to be applied in granting or denying stays of execution. The decision here will

ultimately affect the right of State legislatures, courts, and juries to impose *and* enforce capital sentences. Years have passed since Thomas Barefoot was convicted and sentenced to death for the cold-blooded murder of Carl Levin, a police officer. In this regard, the case at bar is typical of all recent capital punishment litigation in which the States' interest in the finality of their judgments has been consistently undermined by repeated federal review of the same issues.

The Washington Legal Foundation can bring to this case a perspective not presently represented. Accordingly, the Foundation respectfully requests permission to participate as *amicus curiae*. Petitioner has consented to WLF's participation. Respondent has refused its consent.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	viii
INTERESTS OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT'S STANDARD FOR DENYING A STAY OF EXECUTION SINCE IT FOCUSES ON THE NATURE OF A PETITIONER'S CLAIMS, ASSURES FULL AND FAIR REVIEW, AND VINDICATES PRINCIPLES OF FEDERALISM TOO OFTEN IGNORED BY FEDERAL COURTS	3
A. The Court of Appeals, Which Found an Indisputable Absence of Merit in Petitioner's Allegations and Detailed the Reasons for Its Findings, Employed an Appropriate Standard and Procedures for Denying a Stay of Execution	3
B. The Fifth Circuit's Denial of a Stay Accords Appropriate Deference and Lends Finality to State Judgments	7
II. THE INTRODUCTION OF PSYCHIATRIC TESTIMONY ON THE FUTURE DANGEROUSNESS OF A CAPITAL DEFENDANT HAS BEEN IMPLICITLY APPROVED IN THIS COURT'S PRIOR DECISIONS AND DOES NOT CONSTITUTE REVERSIBLE ERROR	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Barefoot v. Estelle, No. 82-1680, slip op. (5th Cir. Jan. 20, 1983) 4, 7, 12
Barefoot v. State, 596 S.W.2d 875 (1980) 8, 12
Barefoot v. Texas, 453 U.S. 913 (1981) 8
Brooks v. Estelle, No. 82-1613 (5th Cir. Dec. 6, 1982) 4, 5
Brooks v. Estelle, 51 U.S.L.W. 3469 (Dec. 6, 1982) 4, 5
Carafas v. LaVallee, 391 U.S. 234 (1968) 5, 6
Eddings v. Oklahoma, 455 U.S. 104 (1982) 3, 4, 11
Estelle v. Smith, 451 U.S. 454 (1981) 11
Gardner v. Florida, 430 U.S. 349 (1977) 3
Garrison v. Patterson, 391 U.S. 464 (1968) 5, 6
Jurek v. Texas, 428 U.S. 262 (1976) 10, 11
Lockett v. Ohio, 438 U.S. 262 (1978) 11
Mulligan v. Zant, 531 F. Supp. 458 (D.C. M.D. Ga. 1982) 5
Nowakowski v. Maroney, 386 U.S. 542 (1967) 5, 6
O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982) 5
White v. Florida, 73 L.Ed.2d 1385 (1982) 5

Miscellaneous:

Berger, *Death Penalties* (1982) 9
O'Connor, *State Courts and Federalism in the 80's*, 22 Wm. & Mary L. Rev. 801 (1981) 9, 10

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The interests of *amicus curiae* Washington Legal Foundation (WLF or Foundation) are set forth in the foregoing motion for leave to file a brief *amicus curiae.*

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit employed an appropriate standard for denying Petitioner's motion for a stay of execution. The standard, which requires that a petitioner demonstrate a substantial federal question on which he has a fair likelihood of success, adequately protects the interests of both the defendant and the state. It permits a court to insure that defendant's claims have been subject to reasoned judgment on the merits as well as to accord the proper deference to the judgment of the state courts which have already examined the same issues. Petitioner's arguments, on the other hand, imply that state courts cannot be trusted to properly adjudicate federal constitutional claims. If upheld, they would further undermine principles of federalism and public confidence in the criminal justice system.

Petitioner's attack on the use of psychiatric testimony to predict future dangerousness at the sentencing phase of his trial also lacks merit. This Court has implicitly approved the use of such testimony and Petitioner's challenge goes to the weight, not the admissibility, of such evidence.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT'S STANDARD FOR DENYING A STAY OF EXECUTION SINCE IT FOCUSES ON THE NATURE OF A PETITIONER'S CLAIMS, ASSURES FULL AND FAIR REVIEW, AND VINDICATES PRINCIPLES OF FEDERALISM TOO OFTEN IGNORED BY FEDERAL COURTS

This Court should affirm the Fifth Circuit Court of Appeals' standard for denying a stay of execution in capital habeas corpus cases. Unlike the standard proposed by Petitioner, it both assures that a death-sentenced prisoner has received full and fair review of his claims and, equally important, accords proper respect to state judgments and state interests in the finality of those judgments.

A. The Court of Appeals, Which Found an Indisputable Absence of Merit in Petitioner's Allegations and Detailed the Reasons for Its Findings, Employed an Appropriate Standard and Procedures for Denying a Stay of Execution

The imposition of capital punishment upon a member of society is an act of the gravest import requiring special protections for defendants. *See, e.g., Gardner v. Florida*, 430 U.S. 358 (1977) (plurality opinion). While the penalty should only be enforced after full and fair review of a defendant's claims, due process does not mean endless process and the penalty should ultimately be enforced. At some point, some court must be able to declare with finality that a death-sentenced prisoner's allegations offer no meritorious grounds for yet "one more" review of his claims. As Chief Justice Burger has noted:

> It can never be less than the most painful of our duties to pass on capital cases, . . . However, there

> comes a time in every case when a court must "bite the bullet."

Eddings v. Oklahoma, 455 U.S. 104, 127 (1982) (Burger, C.J., dissenting).

The argument here, at least nominally, is over whether that point had been reached at the time Petitioner's case arrived at the Fifth Court. The Washington Legal Foundation believes that it had as an examination of the Court of Appeals disposition of the case demonstrates.

Petitioner and supporting *amici*'s attempt to paint the Fifth Circuit's action as a rushed, ill-considered judgment based upon inadequate briefing and review of the issues fails to withstand scrutiny. Petitioner's allegations—and the Fifth Circuit's treatment of them—cannot be separated from all that transpired during the prior history of this litigation. As in most death cases, Petitioner's claims were thoroughly briefed time and again and numerous state and federal courts found his trial and sentence to be free of constitutional infirmity. His motion for a stay of execution was "directed solely to the merits" of the alleged constitutional irregularities of his conviction and sentence and the "parties were afforded an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral arguments." *Barefoot v. Estelle*, No. 82-1680, slip op. at 6 (5th Cir. Jan. 20, 1983). In addition, the court had the benefit and took advantage of the full trial court record. *Id.* at 16. Finally, the Court of Appeals examined each of Petitioner's contentions and detailed its reasons for concluding that they lacked merit.

The Fifth Circuit thus properly denied Petitioner a stay of execution. The standard employed by the court, which requires that a petitioner demonstrate a substantial federal question on which he has a fair likelihood of success, adequately protects the interests of all parties involved and fulfills the duty of a court "to act impar-

tially between the condemned and the state, favoring neither the state nor the condemned." *Brooks v. Estelle*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982), *citing*, *Brooks v. Estelle*, No. 82-1613 (5th Cir. Dec. 6, 1982).

The standard permits a court to insure that meritorious appeals are subject to a reasoned judgment that a death sentence has not been imposed in violation of the Constitution. However, it also takes into account the existence of the prior briefing and argument on identical issues earlier in the case, rather than treating the motion for a stay as a discrete event involving previously unlitigated issues. In short, the court appropriately reviews the case under standards which are familiar to it and furnish guidance for its determination without acting as "super" trial court. *See O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982); *Mulligan v. Zant*, 531 F. Supp. 458 (D.C. M.D. Ga. 1982).[1]

Moreover, the Fifth Circuit's treatment of the case comports with the applicable decisions of this Court. Petitioner's reliance on *Nowakowski v. Maroney*, 386 U.S. 542 (1967), *Garrison v. Patterson*, 391 U.S. 464 (1968), and *Carafas v. LaVallee*, 391 U.S. 234 (1968), is misplaced. An objective reading of those decisions indicates that the court below employed proper procedures in denying the stay of execution.

While *Nowakowski, supra*, requires that a habeas petitioner be permitted to address the merits once a court has issued a certificate of probable cause, this Court has also recognized that such an appeal may still be frivolous and that summary procedures may be available. For instance, in *Carafas, supra*, this Court reversed a denial of leave to proceed *in forma pauperis* and stated that:

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[1] In fact, the standard is similar to that followed in determining whether to grant a stay of a state court judgment pending application for certiorari in this Court. *White v. Florida*, 73 L.Ed.2d 1385, 1386 (1982) (Powell, J., in chambers).

> Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

391 U.S. at 242. Similarly, the *Garrison* Court discussed the mandate of *Nowakowski* and held that:

> As we only recently noted in *Carafas v. LaVallee*, 391 U.S. 234, at 242, *Nowakowski does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases. Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted.* We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed by rule or otherwise, that his opportunity will be limited. Within this general framework, the promulgation of specific procedures is a matter for the courts of appeal.

391 U.S. at 446-447 (emphasis added). Thus, the Court of Appeals can properly consider the merits of an appeal in a summary proceeding under the applicable decisions of this Court.

That the Fifth Circuit did so in the case at bar speaks more to the merit of Petitioner's claims than it does to the validity of the determination. *Amicus* WLF agrees

with the Fifth Circuit's judgment that courts should not be prevented "from denying [a] stay if there is an indisputable absence of merit to petitioner's complaint." *Barefoot*, slip op. at 6.

B. The Fifth Circuit's Denial of a Stay Accords Appropriate Deference and Lends Finality to State Judgments

The Fifth Circuit Court of Appeals' denial of Petitioner's motion for a stay of execution manifests a concern for principles of federalism too often lacking in members of the federal judiciary in death penalty litigation. In reviewing Petitioner's claims, the court properly concluded that:

> If after all these years of study, no constitutional imperfections of substance can be found [with petitioner's conviction and sentencing], it becomes the duty of this court to deny the stay and refuse to interfere with the authorities of the State of Texas as they follow the law of that state.

Barefoot v. Estelle, No. 82-1680, slip op. at 3 (5th Cir. Jan. 20, 1983). Given the current state of capital punishment litigation in this country, the Washington Legal Foundation submits that the Fifth Circuit's balanced view of a federal court's duty deserves approval and emphasis by this Court.

The instant case offers a primary illustration of the problems which currently plague the administration of capital punishment statutes in this country and undermine public confidence in the criminal justice system. No question exists as to Petitioner's guilt or the heinous nature of the crime which led to the imposition of his capital sentence. Without reason, Petitioner shot a police officer in the head at close range—a crime so utterly reprehensible that the jury could only react with moral outrage to the harm done to societal values by its commission.

Despite the undisputed fact of Petitioner's guilt and the heinous nature of his crime, he has prevented the execution of his sentence, now almost five years old, by repeatedly raising the same issues in different courts without success. Petitioner was convicted and sentenced in the Texas district court in November, 1978. The Texas Court of Criminal Appeals affirmed his conviction and sentence and denied a motion for rehearing. *Barefoot v. State*, 596 S.W.2d 875 (Tex. Cr. App. 1980). This Court denied his petition for writ of certiorari in June, 1981. *Barefoot v. Texas*, 453 U.S. 913 (1981). Subsequently, Petitioner filed a state habeas corpus petition in the state district court. The petition was denied and the denial was affirmed by the Texas Court of Criminal Appeals. Petitioner next raised his claims in a petition for writ of habeas corpus in the federal district court. The district court held an evidentiary hearing and denied the petition in November, 1982. Now, Petitioner and supporting *amici* claim that the Court of Appeals must conduct what amounts to a *de novo* review of the claims he has repeatedly raised and lost since 1978 on the chance that a court or judge might finally agree and spare him his peers' judgment.

The point of view implicit in petitioner's arguments as well as those of supporting *amici* is that the state courts cannot be trusted to act as fair and competent forums in the adjudication of federal constitutional claims. Consequently, petitioner and *amici* place special emphasis on the fact that this is his *initial* federal habeas corpus appeal and conclude that he is constitutionally entitled to a second full federal review of all of his claims (the district court having conducted one in the first instance).[2]

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[2] The concomitant implication of Petitioner and *amici's* arguments is that the "full review" they demand must be tailored to what they, not a court, believe is "full review." One might reasonably suspect that their view of the matter has more to do with opposition to capital punishment *per se* than it does with the

No intrinsic reason exists for Petitioner to imply and this Court to sanction that federal judges are fairer or more sensitive to federal rights in capital cases. Merely because a lawyer dons the robes of a federal district or appellate judge does not magically infuse him with greater wisdom and compassion. State trial judges are well qualified to decide constitutional issues in death penalty cases and their judgment should be respected once they have found that a jury acted within constitutional bounds and the judgment has already withstood state and federal review.

It is particularly telling that Petitioner and *amici* state the truism that federal judges are sworn to uphold the United States Constitution. From this, they erroneously conclude that federal review of state claims is mandatory. However, their conclusion ignores two basic facts: (1) state court judges also take an oath to support and defend the Constitution; and (2) any commitment to uphold the Constitution is also a commitment to uphold the federalist system of government which it embodies.

Justice O'Conner has recently written that:

> If our nation's bifurcated judicial system is to be retained, as I am sure that it will be, it is clear that we should strive to make both the federal and state systems strong, independent, and viable . . . . State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and

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substance of the review actually accorded petitioner's claims. As a noted scholar recently stated about such situations:

> A phalanx of counsel . . . have . . . created a 'death-row logjam,' . . . . By one stratagem or another they have succeeded in keeping convicted murderers, guilty beyond a doubt and under State law subject to the death penalty, alive for ten years.

Berger, *Death Penalties* 6 (1982).

> give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court.

O'Connor, *State Courts and Federalism in the 80's*, 22 Wm. & Mary L. Rev. 801, 814-15 (1981).

Amicus Washington Legal Foundation believes that the step recommended by then Judge O'Connor is one this Court must take. The repeated statements by this and other federal courts that capital punishment is a matter properly left to state authorities have begun to have a hollow ring as a practical matter. At some point, it must be acknowledged that the tortuous procedural path of capital cases does more to undermine the administration of criminal justice and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. As matters now stand, criminals can scoff at the death penalty knowing that a sympathetic judge is likely to be found at some point in the appellate process to overturn or delay the execution of his sentence. The mockery made in recent years of society's right to express its revulsion for particular crimes by imposing capital sentences must be put to an end. The federal courts should signal that state legislatures and juries will have the power in fact as well as in word to protect their citizens as they see fit. To do otherwise violates fundamental notions of federalism and comity.

II. THE INTRODUCTION OF PSYCHIATRIC TESTIMONY ON THE FUTURE DANGEROUSNESS OF A CAPITAL DEFENDANT HAS BEEN IMPLICITLY APPROVED IN THIS COURT'S PRIOR DECISIONS AND DOES NOT CONSTITUTE REVERSIBLE ERROR

Amicus will make only a few practical points about Petitioner and supporting *amici*'s attack on the use of psychiatric testimony at the sentencing phase of his trial. The use of such evidence has been implicitly approved in the prior decisions of this Court. In *Jurek v. Texas*, 428

U.S. 262 (1976), the Court considered a vagueness challenge to requiring the jury to predict future behavior under the Texas capital punishment statute and found that the jury was qualified to make such a determination. While the Court did not reach the question of the types of evidence which are admissible, it noted that "[w]hat is essential is that the jury have all possible relevant information about the individual defendant. . . ." *Id.* at 276. *See also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981), this Court ruled that the use of psychiatric testimony at the sentencing stage violated a defendant's rights when the testimony was based on an interview conducted without notification to defendant's counsel or warning to defendant of his right to remain silent. However, the Court examined the implications of its ruling on the state's ability to prove dangerousness under the statute and stated that "the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts . . ." and that *Jurek* "in no sense disapprov[ed] the use of psychiatric testimony bearing on the issue of future dangerousness. . . ." 101 S. Ct. at 1878. Both of these statements indicate at least tacit approval of such testimony.

Similarly instructive is this Court's opinion in *Eddings, supra*, in which the Court focused largely upon psychiatric and psychological testimony which was offered as mitigating evidence. Based upon the conclusion that the evidence had not been properly considered, this Court overturned Eddings' capital sentence.

Surely, psychiatric testimony must be admissible in aggravation as well as in mitigation if the courts are to properly balance the interests of the defendant and the interests of the state and the public it represents. As the

courts below properly recognized, Petitioners' challenge to the use of psychiatric testimony goes to the *weight* of the testimony, not its *admissibility*. *Barefoot v. State*, 596 S.W. 2d at 887-888; *Barefoot v. Estelle*, No. 82-1680, slip op. at 7-10. Hence, Petitioner's challenge should be rejected out of hand.

CONCLUSION

The practice of granting stays of execution on an almost automatic basis simply to allow another appeal of already litigated and already reviewed issues is in need of drastic curtailment by this Court. Therefore, *amicus curiae* Washington Legal Foundation submits that this Court should affirm the ruling of the Fifth Circuit Court of Appeals in this case.

Respectfully submitted,

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